Supreme Court, U. S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1855

ROSS CATES, INDIVIDUALLY, AND AS NATURAL TUTOR OF HIS MINOR SON, LARRY G. CATES,

Petitioner

versus

BEAUREGARD ELECTRIC COOPERATIVE, INC. and CECIL RIBBECK,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

ROSS CATES INDIVIDUALLY, AND AS NATURAL TUTOR OF HIS MINOR SON, LARRY G. CATES

Petitioner

versus

BEAUREGARD ELECTRIC COOPERATIVE, INC. AND CECIL RIBBECK

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

Petitioner prays that a Writ of Certiorari issue to review the Judgment of the Supreme Court of the State of Louisiana entered in the above case on February 23, 1976, and the denial by the said Court of the petition for rehearing on March 26, 1976.

THE CITATION TO OPINION BELOW

The Judgment of the Supreme Court of the State of Louisiana is reproduced in the appendix and reported at 328 So. 2d 367.

JURISDICTION

The Judgment of the Louisiana Supreme Court was entered on February 23, 1976. A timely Petition for Rehearing was filed and rehearing was denied on March 26, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3); the Judgment of the Louisiana Supreme Court

being repugnant to individual rights guaranteed by the United States Constitution.

QUESTIONS PRESENTED

1

Judicial determination of issues in controversy in the summary proceeding, violates procedural Due Process, that is guaranteed by the Fourteenth Amendment, where the state has established an adversary proceeding for trial on the merits, then fails to allow all citizens to use this procedure.

II.

The Judicial doctrine of Contributory Negligence segregates injured parties into two classes on an unreasonable basis for outmoded reasons. As a result of this segregation into classes, those injured persons "guilty" of contributing to their own misfortune are barred from recovery. This bar to recovery violates the individual's rights to equal protection of the law, guaranteed by the Fourteenth Amendment of the U.S. Constitution.

STATUTES INVOLVED

Louisiana Code of Civil Procedure Article 966

Louisiana Code of Civil Procedure Article 1731

Louisiana Code of Civil Procedure Article 1734

Louisiana Code of Civil Procedure Article 2315

45 U.S.C. 52,55

46 U.S.C. 688

STATEMENT OF THE CASE

In September of 1972, Larry Cates, Kent Guy, and Ronnie Cates were riding their horses on a sixty acre tract of land owned by the defendant, Cecil Ribbeck, in the rural community of Moss Bluff, Louisiana. This tract of land was adjacent to another sixty acre tract of land owned by the defendant's brother, Philip Ribbeck. This propertywas haphazardly fenced and not posted. The property was, in fact, used by members of the community for such activities as horseback riding, hiking, picknicking, camping, motorcycle racing, hunting, fishing, black berry picking, and other activities. This combined one hundred and twenty acre tract of land is located near the residence of young Larry Cates.

Located on the property owned by Cecil Ribbeck was an old abandoned farm house. This house had been abandoned for a period of approximately twenty years. There had been no electrical service to this farm house since February 18, 1957. (Tr. 183).

Electrical service was supplied to this farm house from the main power source which ran adjacent to a public roadway some 800 feet away. This service was supplied via wire, which ran from a junction at the power source, across the roadway, then atop service poles which ran directly to the house. This line served only the abandoned house on the Ribbeck property, and dead-ended at this house. When in use, the line carried 7,620 volts, reduced by a transformer on the pole adjacent to the house to 110 volts.

Several weeks prior to the accident, Larry Cates, and Kent Guy were riding horses on this property, as they had done many times in the past. Kent Guy's horse stalled and both boys stopped riding. Across the path was a bare copper wire

that sagged between the pole adjacent to the house and the pole running back toward the highway, and the power source. Kent Guy dismounted, and moved the bare wire with his hand. He picked up the wire and threw it into some bushes. (Tr 425)

Some time after this incident, the shop teacher at Sam Houston High School, Mr. Garth Prudhome, asked his class to bring in scraps of copper wire. The scraps would be sold with proceeds going to the local chapter of the Future Farmers of America.

Larry Cates, Kent Guy, and Ronnie Cates were again horseback riding on the property on September 30, 1972. The boys, remembering the request of Mr. Prudhome, sought to secure the wire they had found several weeks earlier. It was not where they had thrown it. The boys then rode to the abandoned farm house. They found two wires hanging from the pole; the remains of the service lines to the house. They yanked on these lines trying to pull them down, but they would not break. Larry then decided to shinny up the pole and free the lines at the point of connection. Larry braced himself on top of the transformer (which was disconnected) and attempted to free the lines. While attempting to perform this task Larry lost his balance. Trying to prevent his fall, Larry grabbed the upper most line on the pole. This line contained 7,620 volts. Larry was subsequently electrocuted, and fell to the ground a distance of approximately twenty feet.

As a result of the accident, Larry Cates became a quadraplegic, having lost his hands and feet (See exhibit A). He is totally paralyzed from his fifth vertebrae down, and has suffered a complete loss of bodily function, and he will never walk again. (Tr 554-555).

The electrical lines were originally installed on July 6, 1948, and no electrical service has been sold to the occupier of the property since February 18, 1957, when service to the farm house was discontinued and the meter removed by Beauregard Electric Cooperative, Inc. The right of way and line was allowed to fall into a state of disrepair and nonuse. Visual contact with the pole, from the roadway was blocked by the growth of trees and brush around it.

As a result of this accident, a tort suit was filed in the Fourteenth Judicial District Court for the Parish of Calcasieu. The suit originally was against the Beauregard Electric Cooperation, Inc., and a number of defendants by the name of Ribbeck. The plaintiff excused a number of the parties from the lawsuit and the only defendants remaining were Beauregard Electric Cooperative, Inc. and Cecil Ribbeck, the owner of the land.

These two defendants filed separate motions for summary judgment based upon the pleadings, affidavits, depositions, and other material contained in the record. A detailed opposition and affidavit was filed by the plaintiff.

The district denied the motions for summary judgment stating that the court believed that there were in controversy material facts that could only be decided by a jury. The court cautioned all parties orally that a motion for summary judgment was not a substitute for a trial.

The defendants then filed a motion for rehearing and this was granted and heard on January 10, 1975. The court reversed its previous position and granted the motions for summary judgment in favor of Beauregard Electric Cooperative, Inc. and Cecil Ribbeck.

The plaintiff lodged and argued his appeal to the Third Circuit Court of Appeal. Judgment was rendered on July 30, 1975, and rehearing was denied on August 30, 1975.

The Supreme Court of the State of Louisiana granted the plaintiff's application for Writ of Certiorari, and subsequently rendered a judgment affirming the lower court's granting of summary judgment. The Louisiana Supreme Court found that sixteen year old Larry Cates was contributorily negligent, as a matter of law, and this barred his recovery; despite the fact the Beauregard Electric Cooperative, Inc. admitted negligence before that court. This judgment was rendered on February 23, 1976. An application for rehearing was timely filed. A rehearing was denied on March 26, 1976.

Petitioner now seeks to invoke the jurisdiction of this court in order to redress the infringment of Larry Cates' federally protected right to Due Process and Equal Protection of the laws.

REASONS FOR GRANTING THE WRIT

I

The Fourteenth Amendment of the United States Constitution guarantees that no citizen shall be deprived of life, liberty or property, without the due process of law. Larry Cates' right to life and liberty received a near fatal interruption on September 30, 1972, when through his own imprudence, and the negligence of Beauregard Electric Cooperative, Inc., he was electrocuted.

Ross Cates, the procedural representation of his son, sought relief for the serious injury to Larry through Civil Proceedings in the State Courts of Louisiana. Though in-

frequently used in State civil proceedings, a jury trial was requested. Louisiana Code of Civil Procedure Article 1731 recognized the right to a trial by jury. Code of Civil Procedure Article 1734 states in part: ". . .unless so specified all issues will be tried by the jury." This suit was filed in the Fourteenth Judicial District Court, Parish of Calcasieu. After preliminary proceedings, the defendants filed a motion for Summary Judgment under the authority of Code of Civil Procedure, Article 966. This motion was initially denied by Judge Vernon, then granted upon rehearing. In his oral reasons for judgment he stated that the plaintiff was contributorily negligent as a matter of law, thus barring his recovery. This decision was up held by the Louisiana Third Circuit Court of Appeals and by the Louisiana Supreme Court.

The Constitution does not require that a state provide a trial by jury in civil matters. However, minimal due process should require a trial on the merits. In *Sexton v. Barry* 233 F.2d 220 cert denied, 352 U.S. 870, 75 S.Ct. 94, 1 L. Ed. 2d 76 (1956) the Court defined "Due Process" as "a law which hears before it condemns, proceeds upon injury, and renders judgment only after trial." In *Boddie v. Connecticut* 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed. 2d 113 (1971) this court said: "Due Process requires, at minimum, that absent countervailing state interest of overriding significance, person forced to settle their claim of right and duty through the judicial process must be given meaningful opportunity to be heard."

The State of Louisiana has throughout its history, provided civil litigants access to its Courts to resolve conflicts. Where a procedure has been established, and made available to all citizens, it is not a denial of Due Process to unreasonably restrict these proceedings when applied to a particular

individual? The state Courts have traditionally provided a trial on the merits to determine facts in controversy. The plaintiff bore the burden of proving his claims, the defendant bore the burden of disproving the claim against himself. At the end of the trial the merits are weighed and judgment is rendered in favor of the successful party. This procedure is basic to our concept of ordered liberty.

The Fourteenth Judicial District Court stopped short of this procedure in deciding the case of *Ross Cates, etc. v. Beauregard Electric Cooperative, Inc., et al.* Summary Judgment was granted in favor of both defendants. Louisiana Code of Civil Procedure, Article 966 provides in part . . .

> The judgment sought shall be rendered forthwith if the pleadings, deposition, and admission on file, together with the affidavit, if any, show that there is no genuine issue as to material fact, and that the mover is entitled to judgment as a matter of law."

There can be no question that issues of material fact were decided by the respective judges in the Summary Proceeding. Due Process of Law in the constitutional sense is denied because of the manner, and for the reason these judgments were rendered. The Louisiana Supreme Court based its opinion on the premise that two events had taken place. First that a conversation had taken place at the base of the pole concerning the possibility of live wires, and secondly that the pole and wire were the property of another.

Neither of these two facts were set forth by the defendant in either of their motions for summary judgment, (Tr. 316 and Tr. 332) and neither of these "facts" were argued. The plaintiffs were not given the opportunity to offer evidence

contra these findings. The judges at the appellate level, found facts that were in controversy, introduced defenses that were not offered by the defendants, and then found for the defendants on the basis of there (the courts) findings. There was no opportunity for the plaintiff to counter these defenses, or offer evidence in his behalf. Such a procedure clearly violates constitutional Due Process, when the state provides other means, i.e. a trial on the merits, for deciding similar matters.

The Fourteenth Amendment requires state action in order to seek federal protection. This court has held that action by state courts is state action within the meaning of this clause. *Mooney v. Halohan*, 294 U.S. 103, 55 S.Ct. 340, 72 L.Ed. 791 (1935); *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107.

The last requirement for jurisdiction under the Fourteenth Amendment is a deprivation by state action of life, liberty or property. The state courts of Louisiana have denied Larry Cates, a fair and reasonable opportunity to assert his claim for personal injuries he received as a result of anothers negligence. In *Martinez v. Fox Valley Bus Line,* 17 F.Supp. 576, that event held: "a right of action by one injured as a result of the negligence of another against the negligent party to recover damages sustained by reason of such injury is "property" within the protection of this amendment."

The actions of the courts of Louisiana have proceeded to dispose of this suit in a manner which offends traditional standards of fairness and substantial justice. Petitioner prays that this Honorable Court consider the merits of the petition and grant a Writ of Certiorari to the Supreme Court of Louisiana, to correct the denial of federally protected rights by that Court.

II.

The Fourteenth Amendment of the United States Constitution commands that all citizens receive equal treatment under the law. This Court has stricken statutes and other laws that have resulted in an unequal treatment because of race, *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), Sex, *Hoyt v. Florida*, 368 U.S. 57, 825 S.Ct. 159, 7 L.Ed. 2d 118, *Alieniage Takahaski v. Fish & Game Comm.*, 344 U.S. 410 68 S.Ct. 1138, 91 L.Ed. 1478 (1948); and illegitimacy, *Levy v. Louisiana*, 391 U.S. 68, 88 S.Ct. 1509 20 L.Ed. 2d 436 (1968). These classifications were stricken because they were founded upon irrational distinctions, that denied the individual the equal protection of the law.

The judicial doctrine of contributory negligence produces similar results. An injured party, because of fault on his part, is forced to bear the entire burden of the damages, while, the tort feasor is completely absolved from liability. The result is barbaric. The result denies the injured party of the equal protection of the law.

Louisiana Civil Code Article 2315 provides; "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it . . ." This statute allows an injured party to recover against the tort feasor who is responsible for the damage. Nowhere in the statute is there language which requires a claiming party to be free from fault. Nowhere in the statute is there language which will absolve a tort feasor of liability.

The language of Article 2315 is clear: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."

This application of a judicial doctrine that is contrary to and in the teeth of the statute denies Larry Cates equal protection. The judicial doctrine of contributory negligence places the tort feasor in a favored position, merely because there was a judicial finding that the plaintiff was also negligent. This doctrine allows the tort feasor to escape liability, when the same conduct would incur liability, but for the fortuity of the plaintiff's imprudence.

Louisiana Courts adopted the common law doctrine of contributory negligence as early as 1878 in the case of *Vernon v. Bankston*, 28 La. Ann. 718. This judge-made rule has existed in Louisiana jurisprudence to the present day. This judicial doctrine creates a class of persons who are barred from recovery by judicial fiat. This doctrine discriminates against a class of injured people whom the state has sought to protect.

In *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412 40 S.Ct. 560, 64 L.Ed. 989 (1920), this court held that: "The classification must be *reasonable*, not *arbitrary*, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." The doctrine of contributory negligence is judicial legislation. It has no legislative authority: it is contrary to the state statutes.

It is well settled that the Equal Protection clause of the Fourteenth Amendment is applicable to the state only and requires state action. In *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948). Chief Justice Vinson wrote: "that the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is

a proposition which has long been established by decisions of this court." As early as 1881 in *Virginia v. Rives*, 100 U.S. 313 25 L.Ed. 667, the court stated, "It is doubtless true that a State may act through different agencies, - either by its legislative, its executive, or its judicial authorities; and the prohibition of the Amendment extend to all action of the State denying equal protection of the laws, whether it be action by one of these agencies or by another."

This court has consistently overturned decisions of state courts, which have not been based on statutes, but were founded on common law rules formulated by those courts, where it was found that those rules resulted in a denial of rights guaranteed by the Fourteenth Amendment. *American Federation of Labor v. Swing*, 312 U.S. 321, 61 S.Ct. 568 85 L.Ed. 855 (1941), *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213, (1940), *Bridges v. California*, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192, (1941).

The common law doctrine of contributory negligence, sets up two classes of injured persons: those who partially contributed to their misfortune, and those who are without fault. This classification results in discrimination against the former class. They are denied equal protection because they fall within the class of persons designated by Louisiana Civil Code Article 2315, yet are prevented from recovering for their injury by the common law doctrine.

Such a judicial designation is patently unfair and bears no relation whatsoever to the object of the legislation, which is to provide recovery or compensation for those who are injured by the fault of another. This doctrine of contributory negligence produces the opposite result, and allows the tort feasor to escape unscathed. Such a result denies the injured party the equal protection of the laws.

The common law doctrine of contributory negligence entered the judicial system of the United States from the early courts of England. There have been many theories propounded to explain this defense. Among the most common explanation is that "the plaintiff should be punished for his misconduct," and "the plaintiff should be required to enter the court with clean hands." I Prosser 4th Ed. 417. Such reasoning coupled with the results it produces, should not be allowed to defeat the constitutional dictates of Equal Protection of the law.

The Congress of the United States has long recognized the harshness of this common law doctrine in legislation concerning accidents that are of federal consequences. The Congress has expressly forbidden the defense of contributory negligence. Both the Federal Employee Liability Act 45 U.S.C. 52, 53, and the Jones Act 46 U.S.C. 688, have provided that contributory negligence shall only serve to diminish damages. The action of Congress is certainly the better reasoned rule of law. The judicial doctrine of contributory negligence, like the doctrine of "separate but equal" has long outlived its usefulness. The absolution by the court, of the tort feasor because of the imprudence of the person injured should not be permitted by the dictates of Constitutional fairness. Larry Cates has been denied Equal Protection of the laws by the Louisiana Court. He has been severly injured by the admitted negligence of the Beauregard Electric Cooperative, Inc. Equal Protection should not require Larry Cates to bear the entire burden of his misfortune.

CONCLUSION

The decision of the Louisiana Supreme Court upholding Summary Judgment in the matter is contrary to constitutional standards of fairness and substantial justice. It is submitted that the matter is now meriting this Court's attention.

Petitioner therefore prays for the issuance of a Writ of Certiorari to the Supreme Court of Louisiana to review their judgment.

Respectfully submitted,

JOHN J. CUMMINGS, III
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416 Gravier Street
New Orleans, Louisiana 70130
Attorney for Petitioner

CERTIFICATE

I CERTIFY that a copy of the foregoing Petition for Certiorari and accompanying brief has been served on opposing counsel of record, Carl H. Hanchey of Jones, Kimball, Patin, Harper, Tete & Wetherill, Gulf National Bank Bldg., Lake Charles, Louisiana 70601 and L. E. Hawsey, III, P.O. Box 532, Franklin, Louisiana 70538, by depositing same in the U. S. mail, postage prepaid, this 22nd day of June, 1976.

JOHN J. CUMMINGS, III

JUDGMENT

14TH JUDICIAL DISTRICT COURT FOR THE PARISH OF CALCASIEU

STATE OF LOUISIANA

NO. 98,028

ROSS B. CATES, JR., and LARRY G. CATES

VERSUS

BEAUREGARD ELECTRIC COOPERATIVE, INC., and CECIL E. RIBBECK

JUDGMENT

This case came to be heard today on the motion for summary judgment filed by Cecil E. Ribbeck, defendant. Present: John J. Cummings, III, counsel for the plaintiffs; Carl H. Hanchey, counsel for Beauregard Electric Cooperative, Inc.; and Lemuel E. Hawsey, III, counsel for Cecil E. Ribbeck.

The Court, having considered the pleadings and the depositions on file, together with the affidavits and exhibits, having heard the argument of counsel, and having concluded that there is no genuine issue as to material fact and that mover is entitled to judgment as a matter of law, for the reasons orally assigned.

IT IS ORDERED, ADJUDGED, AND DECREED that there be judgment in favor of mover, Cecil E. Ribbeck, and against the plaintiffs, Ross B. Cates, Jr., and Larry G. Cates,

rejecting their demands and dismissing their suit, with prejudice and at their costs.

JUDGMENT READ, RENDERED, AND SIGNED at Lake Charles, Louisiana, on this 10th day of January, 1975.

s/ EARL E. VERON
DISTRICT JUDGE

FILED:
January 10, 1975
s/ Jo Ann Benoit
Deputy Clerk of Court
Calcasieu Parish, Louisiana

ROSS CATES AND LARRY G. CATES

VS. NO. 98,028

BEAUREGARD ELECTRIC COOPERATIVE, INC. and CECIL E. RIBBECK

14TH JUDICIAL DISTRICT COURT
STATE OF LOUISIANA

PARISH OF CALCASIEU

FILED: Jan 31, 1975
s/ Joan Bourgeois
Deputy Clerk of Court
Calcasieu Parish, Louisiana

JUDGMENT

This case came to be heard the 10th day of January, 1975, on the motion for summary judgment filed by BEAUREGARD ELECTRIC COOPERATIVE, INC., defendant. Present: John J. Cummings, III, counsel for plaintiffs; Carl H. Hanchey, counsel for BEAUREGARD ELECTRIC COOPERATIVE, INC.; and Lemuel E. Hawsey, III, counsel for Cecil Ribbeck.

The Court, having considered the pleadings and the depositions on file, together with the affidavits and exhibits, having heard the argument of counsel, and having concluded that there is no genuine issue as to material fact and that mover is entitled to judgment as a matter of law, for the reasons orally assigned:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of mover, BEAUREGARD ELECTRIC COOPERATIVE, INC., and against the plaintiffs, ROSS CATES and LARRY G. CATES, rejecting their demands and dismissing their suit, with prejudice, at their costs.

JUDGMENT RENDERED in Open Court on January 10, 1975, and SIGNED in Chambers at Lake Charles, Louisiana, on this 31st day of January, 1975.

s/ Earl E. Veron
DISTRICT JUDGE

ORAL REASONS FOR JUDGMENT

IN THE FOURTEEN JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF CALCASIEU
STATE OF LOUISIANA

ROSS CATES, INDIVIDUALLY, ETC.

VERSUS NUMBER 98,028

BEAUREGARD ELECTRIC COOPERATIVE, INC., ET AL.

ORAL REASONS FOR JUDGMENT RENDERED IN OPEN COURT ON JANUARY 10, 1975

Veron, Judge

In the matter before the Court today, this involves a case where a young man at the age of sixteen climbed a utility pole, an electrical pole, belonging to defendant, Beauregard Electric Cooperative, in an endeavor to secure copper wire.

The evidence is undisputed that the copper wire was better than twenty feet from the ground.

Exceptions and motions have been filed in this case previously, and the Court refused to grant the motion for a summary judgment, or to maintain the exceptions of no cause of action.

The matter today is on a rehearing for those motions and exceptions.

I have reviewed the jurisprudence and find that the Court was in error in previously refusing to grant the motion for summary judgment, because it finds that there was no material issue of fact as to the fact that in this unfortunate

accident young Larry Cates climbed this pole for his own reasons and his own purpose to secure copper wire off of a pole that belonged to someone else.

The Court finds that the motion for summary judgment should be granted, primarily on the fact that as a matter of law young Mr. Cates was guilty of contributory negligence at the least in climbing this pole. There are other reasons, but this Court deems that to be sufficient.

For these reasons, the motions for summary judgment filed in behalf of defendants, Beauregard Electric Company and Cecil Ribbeck, will be granted.

A formal decree will be signed when presented to the Court.

* * * * * * *

I do hereby certify that the foregoing 3 pages of type written matter constitute a true and correct translation of my stenographic notes taken in the above numbered and entitled cause at the time and place set forth on page one hereof.

s/ Evelyn Bennett
Official Reporter

FILED Apr 29, 1975
s/ Evelyn Vincent
Deputy Clerk of Court
Calcasieu Parish, Louisiana

NUMBER 5061
COURT OF APPEAL, THIRD CIRCUIT
STATE OF LOUISIANA JUL 30, 1976

ROSS CATES, INDIVIDUALLY, ETC.
Plaintiff & Appellant

VERSUS

BEAUREGARD ELECTRIC COOPERATIVE, INC., ET AL.
Defendant & Appellee

Appeal from the Fourteenth Judicial District Court for the Parish of Calcasieu, Judge Earl E. Veron presiding

Before Hood, Culpepper and Watson, Judges
Culpepper, Judge

This suit was originally filed by Ross Cates, individually and on behalf of his minor son, Larry G. Cates, seeking damages for personal injuries sustained by Larry when he came in contact with an energized electric wire on a utility pole owned by the defendant, Beauregard Electric Cooperative, Inc., and situated on the property of the defendant, Cecil Ribbeck. After suit was filed on September 19, 1973, Larry G. Cates became 18 years of age on February 2, 1974, and he was named a party plaintiff. The district Judge granted motions for summary judgment in favor of both the electric company and the landowner. Plaintiffs appealed.

The decisive issue is whether defendants are entitled to summary judgment on the grounds that Larry G. Cates was contributorily negligent.

(Watson, J. dissents and will assign written reasons.)

The facts, as shown by the pleadings, depositions, affidavits and other documents, which may be considered for purposes of the summary judgment, are as follows: The

defendant, Cecil Ribbeck, owns approximately 70 acres of piney woods land in a rural area near Moss Bluff, Louisiana. The property is bound on the west by a blacktop highway, Perkins Ferry Road, and on the north by Joe Miller Road. There are barbed wire fences along the roads, but none on the other boundaries. On the land is an old farm house, which has been abandoned for 15 or 20 years. The property is uninhabitated and unused. It is grown up in bushes, briars and trees.

When the old farm house was in use, the defendant, Beauregard Electric Cooperative, Inc., had erected an uninsulated 7620 volt feeder line from Perkins Ferry Road a distance of about 800 feet to the house. The line was supported by four wooden poles about 28 feet in height, the last pole being near the house. A transformer was attached to the pole near the house at an elevation of about 22 feet. Two insulated copper wires for 110 volt service ran from this transformer to the house.

When the farm house was abandoned in about 1957, the service wires from the transformer to the house were cut, and they hung down from the pole to an elevation of about 10 feet from the ground. The stinger line from the transformer up to the 7620 volt line on top of the pole was disconnected by opening a hot line clamp. The 7620 volt primary line on the top of the pole remained energized. This was the condition of the electrical equipment on September 30, 1972, the time of the accident with which we are involved in this case.

On the date of the accident, the plaintiff, Larry Cates, who was then 16 years of age, and his brother, Ronald B. Cates, 9 years of age, and his friend, Kent Guy, 16 years of age, were riding horses in the area, as they had done many times before. They entered Ribbeck's property through an unfenced portion of the boundary. Their purpose was to pick up some copper wire which they had seen lying on the

ground on a previous visit. The shop teacher at their high school had asked the class to bring in copper wire for sale for the benefit of The Future Farmers of America.

The boys first rode to the area where they had previously seen the copper wire lying on the ground, but it was gone. They then went to the old farm house and decided to try to remove the two insulated copper wires hanging down from the transformer. Once before, Kent Guy had tried to shinny up this pole to get these copper wires but he was unable to climb the pole.

Larry Cates decided to climb the pole and get the wire. The deposition of his brother, Ronald Cates, describes what happened as follows:

> "Well, once before Kent had tried to climb up a pole and get the copper wire but he couldn't so we were just riding along and they decided they wanted to go over and so then they looked up there and saw that copper wire. So Larry started over there towards the pole and stood up on the saddle and climbed up. And he stuck his left foot on the transformer and his right foot on the bottom ring and he went – he held around the pole with his right arm, and he reached in his pocket to get the pliers to cut the copper, and he started slipping and he reached up there and grabbed it."

Kent Guy stated in his deposition that after Larry shinnied up the pole and got on the transformer, he heard something cracking and popping and heard Ronnie scream,and then he looked to the top of the pole. Kent describes what he saw as follows:

"Q. What was happening on the pole?

"A. He had his left hand on the wire and the

sparks were flying.

"Q. Which wire are you talking about now that he had his hand on?

"A. The wire that goes from pole to pole.

"Q. It would be the wire closest to the top of the pole?

"A. Yes."

As a result of burns received in the accident, Larry Cates lost his left arm at the shoulder, his right arm near the wrist and his left leg. He is scarred over most of his body and he is paralyzed, from the 5th thoracic vertebra down.

Plaintiffs' principal contention is that summary judgment is inappropriate because there are genuine issues as to material facts within the meaning of LSA-C.C.P. Article 966. In their brief, plaintiffs list these issues of fact as follows:

"(1) Status of Larry Cates with reference to the power company;

"(2) Status of Larry Cates with reference to the landowner;

"(3) Negligence of Cecil Ribbeck;

"(4) Negligence of Beauregard Electric Cooperative, Inc.;

"(5) Proximate cause of injury;

"(6) Negligence of Larry Cates;

"(7) Applicability of the doctrine of 'attractive

nuisance;' and

"(8) Wanton negligence of either defendants."

We will discuss these alleged genuine issues of material facts in the order in which they are listed above.

STATUS AS TO POWER COMPANY

The first alleged issue is the status of Larry Cates with reference to the Power Company. Plaintiffs say there is a fact issue as to whether Larry was a trespasser, a licensee or an invitee, and that this issue is material because the duty of the Power Company toward Larry varies according to his status.

The plaintiff, Mr. Ross Cates, filed in the record his affidavit stating that the property owned by Cecil Ribbeck was used as a "recreational area" by numbers of people who engaged in such activities as picknicking, hunting, fishing, swimming, blackberry picking, horseback riding, hiking and even motorcycle racing. Mr. Cates states in his affidavit that he could produce 50 witnesses who actually used the property for these purposes prior to the date of the accident in 1972. Plaintiffs contend that this affidavit, together with the depositions of Kent Guy and Ronald Cates that they had been on the property many times for the purpose of horseback riding and hunting, are sufficient to show that this was a "recreational area" frequented by children and other people and that there was an implied invitation or at least implied permission by the owner for such use.

Even if the affidavits and depositions are sufficient to raise an issue of fact as to whether young Cates entered the premises as an invitee or a licensee, there is no question that he exceeded the scope of any such implied invitation or permission and became a trespasser, when he began to climb the service pole for the purpose of taking copper wire which he

knew was the property of another. The law is that an invitee or licensee loses this status when he goes outside the portion of the premises covered by the invitation or permission Comment, Land Occupiers Liability to Trespassers, 18 La. L. Rev. 716 (1957); Prosser, Law of Torts, Section 61, at pages 391-92, 4th Ed. (1971); Restatement, 2d, Torts, Section 341, Comments (a) - (c) (1965). In Louisiana this principle has been applied to deny recovery by a tavern patron who entered a wareroom in the rear of defendant's saloon and sat down on a barrel covered with lye, Roshee v. Grant, 152 La. 383, 93 So. 102 (1922); by a super market customer who slipped and fell behind a meat counter, Clement v. Bohning, 159 So. 2d 495 (4th Cir. 1964); and by a maid who fell through a sky light in an apartment she was not supposed to clean, Gray v. Elgutter, 5 La. App. 315, (1st Cir. 1926).

In the early case of Lapouyade v. New Orleans Railway & Light Company, 138 La. 237, 70 So. 110 (1915), plaintiff's 17 year old boy was killed by an electric shock when he reached more than six feet up defendant's wooden lamp post on the public street and jerked a wire hanging down from an arc light, his intent being to brighten the light. The court denied recovery on the grounds that the boy was a trespasser, even though he did not climb the pole, as in the present case. The court held:

> "We do not think the case is one exactly of contributory negligence. The young man's act was not one of negligence, but of trespass. If a man climbs one of the posts of the defendant company, and lays his bare hand upon a naked wire, and receives a fatal shock, the defense to a suit for his death will not be contributory negligent,but that he was a trespasser, and that his own act caused his death. Stansfield v. Chesapeake Telephone Co., 123 Md. 120, 91 Atl. 149, 52 L.R.A. (N.S.) 1170. The present case is not so flagrant a one as that. The young man did not climb the post. He only went

> out of his way to it, and reached up to where the danger lurked; and the danger was not equally evident. But the two cases are analogous in that in both the party injured was a trespasser, and that the proximate cause of his injury was his own voluntary act. In the case supposed, of a person climbing one of the posts, the trespass would be of a more pronounced character than in the present one, and the imprudence greater; but the act in the present case was, none the less, a trespass. Not a trespass, perhaps, for which an action would lie in favor of the defendant company, but still a meddling without right with the property of another, and therefore a trespass. And it was the proximate cause of the injury, for it was the voluntary, unlawful act of a rational person operating upon an already existing condition."

When the hypothetical case suggested by the court in Lapouyade finally arose more than a half century later, the court reached the result suggested, and held that a 14 year old boy who entered an electric substation, climbed a tower and came into contact with an energized wire was a trespasser, Tooraen v. New Orleans Public Service, Inc., 243 So. 2d 312 (4th Cir. 1971).

The courts of other jurisdictions have also concluded that persons who have a right to be on the ground near an electric utility pole become trespassers when they exceed the scope of their invitation or permission by climbing the pole. See Ryckeley v. Georgia Power Company, 122 G. App. 107, 176 SE 2d 493 (1970) (tower on right of way used by children); Crosby v. Savannah Electric & Power Company, 114 Ga. App. 193, 150 SE 2d 563, (1966) (a pole near vacant lot where children played); Moseley v. Kansas, 170 Kan. 585, 228 P. 2d 699 (1951) (pole on city street corner); Urban v. Central Massachusetts Electric Company, 301 Mass. 519, 17 NE 2d 718 (1938) (pole on playground); Texas Light &

Power Company v. Burt, 104 SW 2d 941 (Texas Civ. App. 1973) (tower in public park); Miller v. Suburban Power Company, 41 Ohio App. 70, 179 NE 202 (1930) (pole on deceased child's playground); Brown v. American Manufacturing Company, 209 Appellate Division 621, 205 NYS 331 (1924) (tower in yard of tenement houses). The rationale of these decisions is concisely stated in Crosby v. Savannah Electric & Power Company, supra, where the court sustained a demurrer by defendant:

> "A trespasser is one who, though peaceably, wrongfully enters upon the property of another. In the context here it is one who wrongfully goes upon or climbs the pole of the defendant; or, to state it differently, one who, without authority or permission from the owner does so. Permission or consent to climb the pole cannot be implied, even if the owner may have knowledge that it was customary for children to play in the area where it was located. (citation omitted) Nor would it matter that the children may have been licensees as to the ground where they played, for extension of permission (express or implied) by the owner of the ground to play upon it could not include an extension of permission by the owner of the pole to climb it. . . It could not be assumed that permission to play upon the land area in the vicinity of the pole would extend to the climbing of the pole to highly dangerous wires some twenty feet above, even if the land and the pole were under common ownership, and much less so when it appears, as here, that the land and the pole were under separate ownership."

Applying these rules of law to the present case, it is clear that even assuming young Cates enjoyed the status of an invitee or a licensee when he entered upon the Ribbeck premises, he lost this status and became a trespasser when he

shinnied up the electric utility pole, for the purpose of taking copper wire which he knew belonged to another.

STATUS AS TO LANDOWNER

The next alleged issue of fact is the status of Larry Cates with reference to the landowner. For the reasons stated above, even assuming Larry was an invitee or a licensee when he entered the premises, there is no question that he became a trespasser when he climbed the pole. Therefore, this is not a genuine issue of material fact.

NEGLIGENCE OF CECIL RIBBECK

The next alleged issue of material fact is the negligence of Cecil Ribbeck. Even assuming for purposes of the motion for summary judgment that the landowner, Cecil Ribbeck, was negligent in allowing this unused but energized electric line to remain on his property, or even assuming that he was negligent in any other respect, this issue is not material because we ultimately decide that young Cates, as a matter of law, was guilty of contributory negligence barring plaintiffs' recovery.

NEGLIGENCE OF THE POWER COMPANY

The next alleged issue of fact is the negligence of Beauregard Electric Cooperative, Inc. This defendant has admitted negligence for the purpose of the summary judgment. Its negligence is therefore not a material issue.

PROXIMATE CAUSE OF INJURY

The next alleged issue of fact is the proximate cause of the injury. Assuming, as we have done, for the limited purpose of the summary judgment, that both the Power Company and the landowner were negligent, in leaving this unused 7620 volt line energized from the public road to the pole at

the house, after electric service to the house had been discontinued, then there is no question that this negligence was a legal cause of the accident. Larry Cates received the electric shock when he grabbed the 7620 volt line. Hence, this causation issue is not material for the purpose of our consideration of the summary judgment.

CONTRIBUTORY NEGLIGENCE OF LARRY CATES

The next alleged issue of fact is the contributory negligence of Larry Cates. This presents the most serious question for our consideration. In the recent case of Campbell v. American Home Assurance Company, 260 La. 1047, 258 So. 2d 81 (1972) our Supreme Court defined contributory negligence generally as follows:

> "Contributory negligence is conduct on the part of a plaintiff in a negligence action that falls below the standard to which a reasonable man should conform for his own protection."

At the time of the accident, Larry Cates was 16 years and 8 months of age. He was in the ninth grade of high school, made average grades and was of normal intelligence. There is no question that under the jurisprudence of Louisiana a youth of this age and intelligence is capable of contributory negligence. Children as young as nine or ten years of age have been held capable of contributory negligence, Young v. Grant, 290 So. 2d 706 (1st Cir. 1974).

In deciding whether a 16-year old youth is guilty of contributory negligence, the same rules are applicable as in the case of ordinary negligence, i.e., consideration is given to the youth's age, background, intelligence and all of the surrounding circumstances of the particular case, Butler v. City of Bogalusa, 258 So. 2d (1st Cir. 1972), writ denied 260 So. 2d 323, 261 La. 544.

In the present case it is not necessary for us to consider the fine line of distinction between contributory negligence and assumption of the risk, as the courts have done in some cases. See the recent case of Langlois v. Allied Chemical Corporation, 258 La. 1062, 249 So. 2d 133 (1971), where the court stated that generally a determination of whether a plaintiff has assumed a risk is made by subjective inquiry, whereas contributory negligence is determined objectively under the reasonable man standard. Here, regardless of whether young Cates actually knew or appreciated the danger, there is no question that he did not comply with the reasonable man standard as established in Louisiana jurisprudence for persons who come in contact with electric utility lines. The Louisiana courts have repeatedly held that, in the absence of unusual circumstances, a person who voluntarily places himself in contact with an obvious uninsulated electric line is guilty of contributory negligence, Hebert v. Coca Cola Bottling Company, 272 So.2d 737 (3rd Cir. 1973); Bordelon v. Continental Casualty Company, 229 So.2d 761 (3rd Cir. 1969); Thomas v. Gulf States Utilities Company, 128 So.2d 323 (1st Cir. 1963); Coulon v. City of Alexandria, 44 So.2d 171 (2d Cir. 1950); Nesmith v. Central Louisiana Electric Company, 257 So.2d 744 (3rd Cir. 1972).

There are cases where the person who came in contact with the energized wire was excused from contributory negligence, where the importance and utility of that which he was seeking to accomplish was weighed against the probability of injury to himself, this being one of the broad standards for determining whether he acted as a reasonable man. For instance, in Whitworth v. Shreveport Belt Railroad Company, 112 La. 363, 36 So. 414 (1904) the injured person was excused where he came in contact with a wire while attempting to rescue another; and in several cases workmen have been excused where they were required to work in close proximity to energized lines, Shreveport v. Southwestern Gas & Electric Company, 145 La. 680, 82 So. 795 (1919); Harper v. New Orleans Public Service, Inc., 300 So. 2d 546

(4th Cir. 1974); Boure v. New Orleans Service, Inc. 255 So. 2d 788 (4th Cir. 1972). The foreman of a crew working on the electric company's substation was excused where previously the work which he had been directed to perform was on de-energized equipment, and he was justified in believing that the work which he was doing was "cold", Cooksey v. Central Louisiana Electric Company, 279 So.2d 242 (3rd Cir. 1973).

In the present case, there were no such exculpating circumstances as those involved in the cases cited above. Here, young Cates was not seeking as an invitee or a licensee to perform some useful purpose, the importance of which can be weighed against the probability of anticipated harm to himself. For the reasons stated in detail above, Cates was a trespasser, who climbed a utility pole for the purpose of taking copper wire which was the property of another. This case falls squarely within the rulings in Lapouyade v. New Orleans Railway & Light Company, supra; Tooraen v. New Orleans Public Service, Inc., supra;and the many cases cited above from other jurisdictions holding that where a person climbs a utility pole with no authority, permission or invitation whatever, he is a trespasser. We find no Louisiana case involving a person who was injured while attempting to appropriate wire from a utility pole. But in Steele v. Lynches River Electric Cooperative, Inc., 191 SE 2d 253 (S. Ct. of S.C. 1972), the court, in granting a motion for directed verdict, held as follows in a situation almost exactly like that involved in the present case:

> "Respondent was nineteen years of age, married and had completed the tenth grade. The evidence, viewed in the light most favorable to him, simply shows that he was injured while attempting to cut a short section from electric wires which had been left hanging from a transformer located on one of appellant's transmission poles. There is no testimony that the wires posed any danger to one

> merely passing by. Respondent came in contact with them only after climbing and standing on top of a nearby barbed wire fence. In doing so, he was attempting to take the wire, which belonged to appellant, for his own use.
>
> "Respondent was an intelligent person and was charged with knowledge that contact with a wire charged with electric current is attended with danger. Under the circumstances, the fact that respondent may not have known the electric wires were charged with current does not relieve him of the responsibility for intentionally coming in contact with the wire. The wire which he intentionally caught was hanging from an electric transmission line. This fact was open and apparent, and gave warning of the likelihood that the wires were charged with current. In spite of this fact, respondent stood on top of the fence and caught hold of the wire. His purposeful action in so doing constituted contributory negligence, *as a matter of law*, and barred him of recovery." (emphasis supplied)

Plaintiffs argue there are circumstances which raise a factual issue as to whether Larry Cates was guilty of contributory negligence, and therefore this issue should be tried on the merits by a jury. Plaintiffs point to the fact that Larry Cates stated in his deposition he had no knowledge that the line was energized. They point to the statements of Larry Cates and Kent Guy that six weeks before the accident they had found some copper wire laying on the ground in the area and had actually touched the wire and moved it from the path of their horses. However, the boys state that on the date of the accident when they went back to pick up this particular copper wire that was on the ground, it was gone. Whether such a copper wire was ever actually on the ground

or not, this was not a circumstance on which Larry Cates had a right to rely in assuming, if he did so, that the 7620 volt line on the top of the poles was not energized.

Plaintiffs also rely on the circumstance that Kent Guy says he believed that the lines were de-energized. Guy stated in his deposition that about six weeks prior to the accident, on the occasion when he tried to shinny up the pole but could not do so, he held in his hands the two insulated copper wires which hung down from the transformer, and they were de-energized. Guy stated that on the date of the accident he again held the two insulated lines and they were de-energized. We conclude as a matter of law that the fact that the two insulated copper wires hanging down from the transformer were de-energized, and that Kent Guy and Larry Cates knew this, would not give these youths the right to assume that the 7620 volt primary line above the transformer on top of the poles was also de-energized. The mere existence of an uninsulated electric transmission line on top of these poles constituted adequate notice to Larry Cates, a trespasser, that the line might be energized, Nesmith v. Central Louisiana Electric Company, 257 So. 2d 744 (3rd Cir. 1972).

ATTRACTIVE NUISANCE

The next alleged issue of material fact is the applicability of the doctrine of attractive nuisance. This doctrine applies only to children of tender years, who are too young to appreciate the danger, Butler v. City of Bogalusa, 258 So.2d 599 (1st Cir. 1972). It does not apply to a normal youth 16 years of age, Tooraen v. New Orleans Public Service, Inc. 243 So.2d 312 (4th Cir. 1971). Therefore, there is not an issue of fact or law as to the applicability of the doctrine of attractive nuisance. As a matter of law, the doctrine cannot be applicable here.

WANTON NEGLIGENCE OF EITHER DEFENDANT

The last alleged issue of material fact is whether either

defendant was guilty of wanton negligence. Of course, even though young Cates was a trespasser, the defendant power company and the defendant landowner owed him the negative duty not to willfully or wantonly injure him, Gothreaux v. Travelers Insurance Company, 299 So.2d 466 (3rd Cir. 1974); Wannage v. Marcantel, 176 So.2d 5 (3rd Cir. 1965); Prosser, Law of Torts, Section 64, at page 436 (3d Ed. 1964). The terms "willful", "wanton", and "reckless" have been applied to that degree of fault which lies between intent to do wrong, and the mere unreasonable risk of harm involved in ordinary negligence. These terms apply to conduct which is still merely negligent, rather than actually intended to do harm, but which is so far from a proper state of mind that it is treated in many respects as if harm was intended. The usual meaning assigned to the terms is that the actor has intentionally done an act of unreasonable character in reckless disregard of the risk known to him, or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow. It usually is accompanied by a conscious indifference to consequences, amounting almost to a willingness that harm should follow. See Prosser, Law of Torts, Section 34, at pages 187-189 (3d Ed. 1964). See also Sullivan v. Hartford Accident & Indemnity Company, 155 So. 2d 432 (2d Cir. 1963); Lipscomb v. New Star World Publishing Corporation, 5 So. 2d 41 (1st Cir. 1941); Jefferson v. King, 124 So.589 (2d Cir. 1929).

As to licensees, the only duty owed by the occupier of the premises is to warn him of any latent, non-apparent dangers or defects which are actually known to the occupier, Gothreaux v. Travelers Insurance Company,299 So. 2d 466 (3rd Cir. 1974); Cothern v. LaRocca, 255 La. 673, 232 So. 2d 473 (1970). However, no such duty is owed to the trespasser to warn him of latent, non-apparent dangers or defects in the premises that are known to the occupier. See the cases cited above in our discussion of the status of young Cates as to the power. company. Lapouyade v. New

Orleans Railway & Light Company, supra and Tooraen v. New Orleans Public Service,Inc., supra, are specific authority for the proposition that there is no duty to warn trespassers of the obvious danger of climbing electric utility poles and coming in contact with uninsulated wires.

Under the undisputed facts of the present case, the strongest argument which could be made that either the power company or the landowner were guilty of wanton negligence is that they knew this electric line on top of the poles was energized and failed to remedy the hazard or to give warning of its presence. Of course, this hazard was not a latent, non-apparent danger, as to which the defendants owed even a licensee the duty of warning. It necessarily follows that there was no duty to warn trespassers of the danger.

Plaintiffs argue that the hazard here was sufficient to constitute a trap. There is authoirity for the proposition that the occupier of premises cannot deliberately set out traps or spring guns for trespassers who might come on the premises. See the Comment, Land Occupiers Liability to Trespassers, 18 La. L. Rev. 716. It cannot be argued tht the hazard in the present case was a trap. This energized wire was 28 feet above the ground and could be reached only by those with the great physical agility and strength necessary to shinny up the pole. And, as stated above, it was not a latent, non-apparent hazard. It was an obvious danger which any reasonable person should have seen and avoided.

IS SUMMARY JUDGMENT APPROPRIATE?

Summary judgment is appropriate when the "pleadings, depositions, answers to interrogatores, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law." LSA-C.C.P. Article 966. Comment (a) under Article 966 states that the summary judgment procedure was adopted for "its potential

for expeditious disposition of frivolous, but well pleaded, demands and defenses."

Of course, we are aware of the jurisprudence under Article 966, et seq. which holds that summary judgments should not be used as a substitute for trial on the merits, and that in case of doubt the motion for summary judgment should be denied, Kay v. Carter, 243 La. 1095, 150 So. 2d 27 (1963) and its progeny.

We are also aware of the general rule that in negligence actions where the question is whether the conduct meets the reasonable man standard, the courts have usually denied motions for summary judgment. See Wright & Miller, Fed. Practice & Procedure, Civil, Section 2729 (Fed. Rule 56).

Whether the reasonable man test presents an issue of fact or an issue of law has been the subject of much discussion in the jurisprudence and by legal scholars. The test for determining whether reasonableness is an issue of fact or an issue of law is that if men of reasonable minds could differ as to the conclusion to be drawn, it is an issue of fact, but if reasonable minds could not differ, then it is a question of law. See Prosser, Law of Torts, 2d Ed., Sec. 36 at pages 208-209.

For the reasons discussed in detail above, we have concluded there is no genuine issue of material fact as to the occurrence of the accident itself. Larry Cates shinnied more than twenty feet up a bare electric utility pole, a feat which required great physical agility. He was a normal intelligent youth, 16 years and 8 months of age. He was charged with knowledge that contact with the electric line on top of the pole could be dangerous. The hazard was open and apparent. When Larry climbed the pole, he was a trespasser, whose conduct had no useful purpose. Under these undisputed facts as to the occurrence of the accident, it is our view that reasonable minds could not differ from a finding that Larry

Cates fell below the standard to which a reasonable man must conform for his own protection, and that he was therefore, as a matter of law, guilty of contributory negligence.

For the reasons assigned, the judgment appealed is affirmed. All costs of this appeal are assessed against the plaintiffs appellants.

AFFIRMED.

SUPREME COURT OF LOUISIANA
NO. 569

ROSS CATES, Individually and as Natural Tutor of his Son, LARRY G. CATES

MONDAY FEB 23, 1976

versus

BEAUREGARD ELECTRIC COOPERATIVE, INC., CARL RIBBECK, CECIL RIBBECK and PHILIP RIBBECK

On Writ of Certiorari, or Review, to the Court of Appeal, Third Circuit, Parish of Calcasieu, Louisiana

DIXON, Justice

Larry Cates, sixteen years and eight months old, suffered an electrocution accident on September 30, 1972 which left him seriously maimed. An action for damages was brought against Beauregard Electric Cooperative, Inc., owner of the utility pole on which the accident occurred, and Cecil Ribbeck, owner of the land where the pole was located. Other defendants, originally named, have been dismissed and are not before us.

Motions for summary judgment were filed by the electric company and the landowner. At first the motions for summary judgment were denied, but, on application for rehearing, the district judge decided that there were no material issues of fact, and gave judgment for the defendants, rejecting the plaintiff's claim.

On appeal, the trial court was affirmed. Cates v. Beauregard Electric Cooperative, 316 So.2d 907 (La. App. 1975).

(Tate, J., dissents and assigns.)
(Calogero, J., dissents)

The majority opinion of the Court of Appeal found that the undisputed facts convicted young Cates of contributory negligence, preventing his recovery. The dissenter in the Court of Appeal, interpreting Odom v. Hooper, 273 So. 2d 510 (1973), to hold that contributory negligence cannot be decided on a motion for summary judgment, was of the opinion that contributory negligence was an issue which should have been submitted to the jury.

The defendant electric cooperative attached to its motion for summary judgment the depositions of Larry Cates, his younger brother, Ronnie (nine at the time of the accident), and Kent Guy (sixteen at the time of the accident), who were the only persons present when Larry was injured. Also attached to the motions were evidence, testimony and drawings describing the physical condition of the electrical apparatus. Defendant Ribbeck relied on other depositions to establish a history of the electrical wire on his property. Plaintiff, in answer to the motions for summary judgment, filed affidavits which tended to establish that, although the land was privately owned, it had acquired the status of a recreational area and was relatively open to public use for activities such as horseback riding, hunting, fishing, etc.

Ribbeck's land consisted of about seventy acres near Moss Bluff. Part of the land was fenced and part was unfenced. The land was bounded on two sides by roads. It contained an old farmhouse which had been abandoned for fifteen or twenty years, and was in a dilapidated condition.

Electrical service had been run to the farmhouse some time after 1948, and had been discontinued about 1957. The electrical wires entered the property about 800 feet from the location of the pole where the accident occurred. There was a tap at the main line pole at the intersection of North Perkins Ferry Road and Dunn's Ferry Road. The main line was charged with 7620 volts, single phase. The primary wire and the neutral wire left the main line and ran easterly across

the road a little more than 70 feet to a pole with a cross-arm, then continued on to Ribbeck's land for over 360 feet to a pole without a crossarm. At this point the primary conductor was at the top of the pole, and the aluminum ground (called the system ground) was attached to the pole 4 feet below the primary. Both wires then (originally) continued for over 430 feet to the pole where the accident happened.

At that point, the line ended. There was a transformer on the pole from which two insulated service wires had once furnished 110 or 120 volts of electricity for the household current at the farmhouse. These wires had been cut. On the day after the accident their ends were about 10 feet above ground level. On the day of the accident there is testimony that the ends of the wires hung from the pole to a point less than 6 feet from ground level.

The pole was 29 feet tall. The primary conductor was 28 feet 4 inches from the ground. Four feet below the primary was the attachment for the neutral wire. Only about 4 feet of the neutral wire remained on the pole. Below the neutral attachment was the transformer, necessary to reduce the current to the voltage required for the household service. The transformer was a little over a foot and a half tall.

A ground wire also grounded the pole; stapled to the pole, it ran its full length to a rod embedded in the earth.

There was no connection between the primary conductor and the transformer. That is, the transformer was not energized. The only energized wire on the pole was the primary conductor, 28 feet 4 inches from the ground.

Larry Cates did not remember anything about the day on which the accident happened until after he fell to the ground from the top of the pole which he had climbed. Ronnie Cates' deposition disclosed that he and Larry went to Kent Guy's home about 4:00 o'clock in the afternoon, and all

three rode their horses on to the Ribbeck place near the abandoned house. When they noticed the wire, Larry stood on his saddle and climbed up the pole to a point where his right foot was on the transformer hanger and his left foot was on the top of the transformer. Ronnie saw Larry reach for the pliers to cut the wire, slip, and grab the primary conductor at the top of the pole.

In his deposition, Kent Guy told of meeting Larry and Ronnie at about 3:30 in the afternoon, that he changed clothes and went horseback riding with the other two boys, and was with them until the accident happened at about 6:00 or 6:30. Kent told of riding with Larry about a month and a half earlier in the vicinity of the pole where the accident happened. Kent's horse had run into a wire that was only three or four feet above the ground, stretched from the pole where the accident happened back to the pole toward the highway. The wire broke when the horse ran into it. Kent said that he picked up one end of the wire and threw it into the bushes out of the way.

This episode was recited by Kent Guy to justify his opinion that there were no energized wires on the pole which he and Larry set out to climb; Kent apparently figured that the top wire in a primary distribution line ought to be the neutral wire.

Kent had with him a tool which he described first as wire cutters and then as "diagonal pliers." He said that he was working on a small tractor when the Cates boys invited him to go riding with them, and was using the pliers at that time. He also said, however, that, after he finished the work on the tractor, he went into the house and changed clothes before going riding.

Kent Guy said they tried to pull down the two dangling wires from the pole, but were unsuccessful. Kent then attempted to climb the pole, but could not. He then gave the

pliers to Larry, who put them in the game pocket of a coat or jacket, and then proceeded to shinny up the pole. Kent said he asked Larry "if he was sure that all the wires up there were dead." Larry replied in the affirmative. (Larry was not unintelligent, and was not unaware of the dangers of electricity). Kent allowed his attention to wander when suddenly Ronnie screamed. Kent looked up and saw Larry hanging by his left hand from the primary conductor.

The employees of the electric cooperative in investigating the accident found the ends of the two insulated wires hanging from the pole to be more than 10 feet from the surface of the ground. They also found flash marks, indicating electrical burns, on the transformer hanger, on the pole ground and on the primary conductor. There was burned flesh on the primary conductor and on the pole ground wire.

When a summary judgment is sought it "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law." C.C.P. 966. Further, when a motion for summary judgment is made and supported, the adverse party cannot rest on allegations of his pleadings, but must set out, in evidence or depositions, "specific facts showing that there is a genuine issue for trial." C.C.P. 967.

The question presented is an uncomplicated one under C.C. 2315: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." For the purposes of the motion for summary judgment, the defendant electric cooperative admits negligence. Defendant Ribbeck makes no such admission. The position of both defendants is that, because of the acts of plaintiff himself, either intentional or negligent, there can be no recovery.

We agree with both courts below. Larry was injured in an

accident caused by his own fault, not the fault of defendants. From the uncontroverted facts before us, we can reach no other conclusion under the present state of the law.

By either subjective or objective standard, Larry's fault is clear. A reasonable person should have known the rish involved in shinnying up a pole to cut an electric wire. Larry knew something about electricity. He was reminded of the danger by his companion as he climbed the pole, but apparently assumed that there were no live wires on the pole. He was not entitled to such an assumption. The fact that a horse had run into a sagging wire several weeks before without harm to horse or rider did not justify a belief that it was safe to climb a 30 foot pole to cut and remove wire.

Uninsulated electric wires carrying high voltage electricity are extremely dangerous. In some situations there might be recovery for injury in spite of fault on the part of the injured person, but not where, as here, one is hurt while in a place where he has no right to be, in an effort to accomplish no lawful purpose, while aware of the danger involved. See Bond v. Toriello, 260 So.2d 727 (La. App. 1972), cert. den. 262 So. 2d 788 (1972).

No logical comparison can be made between this case and cases like the "spring-gun" cases. Katko v. Briney, 183 NW 2d 657 (Iowa 1971); Prosser, Law of Torts, 4th ed. § 21 (1971). There is no trap set. Electric wires on a pole are an announcement of danger to almost anyone smart enough and old enough to get himself in contact with a wire 28 feet above the ground. See Nessmith v. Central Louisiana Electric Co., 257 So. 2d 744 (La. App. 1972), cert. den. 259 So. 2d 921 (1972).

Plaintiff relies strongly on Odom v. Hooper, supra, for his contention that contributory negligence cannot be decided on a motion for summary judgment. His reliance is misplaced; Odom v. Hooper should not be so interpreted. When the

evidence submitted on the motion leaves no relevant, genuine issue of fact, and when reasonable minds must inevitably conclude that the mover is entitled to judgment on the facts before the court, the motion for summary judgment should be granted (C.C.P. 966), even if the defense is contributory negligence.

Our conclusions are applicable to plaintiff's claims against Ribbeck, the landowner, as well as against the electric cooperative. We note, however, that the Court of Appeal resorted to a "status" analysis to determine the duty owed by the landowner, concluding that, since plaintiff was a "trespasser," at least when he began to climb the pole, the landowner owed him no duty except to refrain from "wanton or willful" conduct which might harm plaintiff.

We find the common law classifications of invitee-licensee-trespasser to be of little help in applying C.C. 2315. See, for example, criticism in 30 La. L.Rev. 217 (1969); 26 La. L. Rev. 520, 522 (1966); 23 La. L. Rev. 296 (1963).

California has a statute very similar to C.C. 2315. California Civil Code art. 1714 states:

> "Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself."

The California Supreme Court has recognized that this section of their Code embodies a civil law and not a common law principle. Fernandez v. Consolidated Fisheries, Inc., 98 Cal. App. 2d 91, 219 P.2d 73 (1950). In the case of Rowland v. Christian, 70 Cal. Rptr. 97, 443 P.2d 561 (1968), the California Supreme Court noted that the common law rules relating to the status of the entrant vis-a-vis the prop-

erty owner are a deviation from the fundamental concept that a man is liable for injuries caused by his carelessness. Therefore, in Rowland v. Christian, supra, it abandoned the trespasser-licensee-invitee classifications in favor of a traditional negligence analysis.

We agree with the California court's approach as adopted in Rowland v. Christian, supra:

> "It bears repetition that the basic policy of this state set forth by the Legislature in section 1714 of the Civil Code is that everyone is responsible for an injury caused to another by his want of ordinary care or skill in the management of his property. The factors which may in particular cases warrant departure from this fundamental principle do not warrant the wholesale immunities resulting from the common law classifications, and we are satisfied that continued adherence to the common law distinctions can only lead to injustice or, if we are to avoid injustice, further fictions with the resulting complexity and confusion. We decline to follow and perpetuate such rigid classifications. The proper test to be applied to the liability of the possessor of land in accordance with section 1714 of the Civil Code is whether in the management of his property he has acted as a reasonable man in view of the probability of injury to others, and, although the plaintiff's status as a trespasser, licensee, or invitee may in the light of the facts giving rise to such status have some bearing on the question of liability, the status is not determinative." Rowland v. Christian, 443 P. 2d 561, 568.

The Court of Appeal reached the correct result. Cecil Ribbeck owed plaintiff the duty of ordinary care under the circumstances. We would not, however, find it necessary to

resort to an invitee-licensee-trespasser analysis to find the duty owed. (Our conclusion – that plaintiff's injury was caused by his own voluntary exposure to the hazardous electric wire – makes it unnecessary to find the precise duty owed by Ribbeck to plaintiff).

Since we find there is no genuine issue as to material fact, and that plaintiff is barred from recovery as a matter of law, the judgment of the Court of Appeal is affirmed at the cost of plaintiff.

SUPREME COURT OF LOUISIANA

ROSS CATES, Individually and as
Natural Tutor of his son, LARRY G. CATES

versus No. 56, 949

BEAUREGARD ELECTRIC COOPERATIVE,
INC., CARL RIBBECK, CECIL RIBBECK and
PHILIP RIBBECK

Dissenting/Concurring Opinion

TATE, Justice (dissenting in part, concurring in part).

I concur insofar as the majority finds no issue of material fact with regard to the negligence of the defendant landowner. He was not responsible for the maintenance of the highly energized line on the poles on his land, nor did he have any knowledge that the apparently dead lines to the former farmhouse location were still energized.

I dissent, however, insofar as summary judgment is rendered in favor of the electric company, the negligence of which is unquestioned. The majority errs in finding that there is no issue of fact with regard to the contributory negligence of Larry Cates, the sixteen-year old minor for whose injuries recovery is sought.

The majority is in error in finding that, under the facts shown for the limited purpose of summary judgment, the plaintiff's contributory negligence as a matter of law bars his recovery. For reasons to be stated later, it is inappropriate under the present showing to determine this issue of fact, under the controverted evidence whether the plaintiff boy's contributory negligence in fact bars his recovery.

First, l.owever, it may be appropriate to consider the legal

issue of the boy's contributory negligence presented by the pleadings, before we discuss whether there is a material issue of fact as to it.

In considering contributory negligence, we must first consider the shown negligence of the electric company. It is the light of the hazard created through its negligence that the reasonableness of the conduct of the boy must be measured – an issue of fact which cannot be determined on motion for summary judgment.

The electric company left energized a main line charged with current of *7620 volts.* No useful purpose is shown for leaving energized with lethal voltage of this magnitude in a dead-end electrical line leading nowhere. Under such circumstances, the creation of a risk of harm of such magnitude, for no reason, constitutes gross negligence. Allien v. Louisiana Power & Light Co., 202 So. 2d 704 (La. App. 3d Cir. 1967), certiorari denied 204 So. 2d 574 (La. 1967).

Similarly, the person subject to such an extraordinary risk may not be under a duty to anticipate it. See *Allien.* Contributory negligence is conduct which falls below the standard to which the plaintiff should conform for his own safety *under the circumstances.* Restatement of Torts 2d, Sections 463, 464 (1965), including an unintentional and unreasonable exposure of himself to danger created by the defendant *of which the plaintiffs know or has reason to know.* Restatement, Section 466(1). See Harper & James, The Law of Torts, Section 22.10 (1956); Prosser on Torts, Section 65 (4th ed. 1971). Further, where there is aggravated negligence by the defendant (as here), the contributory negligence of the plaintiff must be of a reckless character to defeat recovery. Prosser, Section 65 at P. 426.

Under these circumstances, a material issue of fact exists whether the conduct of the boy, *under the circumstances,* amounts to contributory negligence which will bar his re-

covery. For instance, a person touching an apparently unenergized line which might at the most have 110 volts, may not be unreasonable to expect slight if any injury by approaching or touching it – as compared with the truly serious injuries that must result if he approaches or touches a line charged with extraordinarily dangerous voltage of 7260 volts.

As a result of his exposure to this extraordinarily dangerous hazard, this young boy lost his hands and feet, is a quadiplegic, and is totally paralyzed from the fifth vertebra down. He has suffered a complete loss of bodily function and will never walk again.

In a motion for summary judgment, the majority is in error in deciding this factual issue of contributory negligence. We ourselves have held that summary judgments must be denied, where there is a "genuine *issue* as to material fact", La. C.Civ. P. art. 966, even though we may have believed that the preponderance of the evidence might favor the defendant moving for summary judgment. Odom v. Hooper, 273 So. 2d 510 (La. 1973) (contributory negligence); Kay v. Carter, 243 La. 1095, 150 So. 2d 27 (1963).

These decisions, and the host of intermediate decisions following them, are authority for the following principles for applying the summary judgment provisions, La. C.Civ. P. arts. 966-68:

The summary judgment remedy, which deprives a litigant of trial on the merits, is not a substitute for such trial. It may not be resorted to whenever there is a genuine issue of material fact which must be resolved. In passing upon a motion for summary judgment, the function of the court is not to determine the merits of the issues raised, but it is rather only to determine whether or not there is a genuine *issue* of material fact. The burden to show there is *not* a material factual issue is upon the mover for summary judg-

ment. All doubts must be resolved against the granting of a summary judgment and in favor of a trial on the merits to resolve disputed facts.

To grant a summary judgment in derogation of these principles, may deprive the opposing party of cross-examination of opposing witnesses and of the opportunity to have the trier of fact evaluate the demeanor testimony of witnesses rather than accept at face value affidavits and depositions prepared or taken in lawyers' offices rather than in open court.

We have, until now, thus adopted the view of those federal decisions which, in applying the federal summary judgment upon which our own is based , have held that a litigant has a right to trial on the merits where is the slightest doubt as to the facts. 6 Moore's Federal Practice, Section 56.13(3) (1965); James, Civil Procedure 235-36 (1965).

As stated at 10 Wright & Miller, Federal Practice & Procedure 514-15 (1973): "Therefore, a party moving for summary judgment is not entitled to a judgment merely because the facts he offers appear more plausible than those tendered in opposition, or because it appears that the adversary is unlikely to prevail at trial. This is true, even though both parties move for summary judgment. Therefore, if the evidence presented on the motion is subject to conflicting interpretations, or reasonable men might differ as to its significance, summary judgment is improper."

The showing here made indicates that the evidence as to contributory negligence is subject to conflicting interpretations. It is improper, on motion for summary judgment, to determine the issue of contributory negligence by our own factual decision of this factual issue. The motion for summary judgment should not be granted simply because we think the facts indicate one party or the other should have judgment on the merits, but only when the showing indicates

there is "no genuine *issue* as to material fact." La. C.Civ. P. art. 966.

To decide an "*issue*" of material fact on motion for summary judgment is contrary to the code articles governing the remedy. It is also, contrary to the intent of the remedy, to deprive a litigant of his right of trial on the merits in open court, with cross-examination and demeanor evaluation and all the traditional aids to truth of our adversary system, and instead to permit disposition on affidavits and depositions read in judges' chambers.

I therefore respectfully dissent as to the grant of summary judgment in favor of the electric company.

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EXHIBIT A